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No. 02-915

In the Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari raises two issues arising from petitioners' 1992 Consent Decree settlement with federal environmental regulators. First, the Seventh Circuit refused to vacate the decree only by taking an exceptionally narrow view of this Court's decision in *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). The court of appeals read *SWANCC* to give federal regulators authority over even "non-navigable, isolated wetlands"—like petitioners'—that have "no surface connection to the nearest stream or nearest navigable body of water." Pet. App. 10a. This reading is at odds with *SWANCC* and implicates a recognized split of authority in the lower courts. Second, the Seventh Circuit held petitioners to their stipulation that federal authorities could regulate petitioners' isolated wetlands. On this score, the court of appeals blatantly ignored jurisprudence from this and other courts refusing to enforce consent decrees or other contracts[1] that purport to expand the scope of federal regulatory power beyond its statutory and constitutional limits.

Remarkably, the government's response pays only scant attention to these important issues. The bulk of the government's argument (at 11-13) is devoted instead to the claim that petitioners do not qualify for relief under Fed. R. Civ. P. 60(b)(5)—an issue that has no bearing on either question presented.[2] While petitioners strongly disagree, their position before this Court—like their argument before the

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[1] As the petition for certiorari explains (at 22 n.6), this Court has repeatedly held that consent decrees are construed basically as contracts for enforcement purposes.

[2] Rule 60(b)(5) provides, in pertinent part, that a "court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" if "it is no longer equitable that the judgment should have prospective application."

district court and Seventh Circuit—does not rely on the change in law that Rule 60(b)(5) requires.[3] The Consent Decree itself gives the district court ongoing jurisdiction "to interpret, enforce, or modify [the] Decree," Pet. App. 35a, and the contract is void *ab initio*, regardless of whether *SWANCC* changed Seventh Circuit law, because it purports to give federal regulators authority beyond statutory and constitutional limits. Accordingly, the government's protracted argument that *SWANCC* did not change Seventh Circuit law has no bearing on petitioners' claim.[4]

The government ultimately spends only three paragraphs on the two issues that are raised in the petition. In a single paragraph, the government claims that the recognized split of authority over the meaning of *SWANCC* does not exist. In the final two paragraphs of its brief, the government simply asserts, without authority, that private parties can consent to federal regulatory jurisdiction beyond regulators' statutory and

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[3] This Court held in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), that a party seeking relief under Rule 60(b)(5) "may meet its initial burden by showing * * * a significant change either in factual conditions or in law."

[4] In fact, *SWANCC*'s definition of "isolated" waters is far more extensive than the definition recognized in *Hoffman Homes, Inc.* v. *Administrator, United States EPA*, 961 F.2d 1310 (*Hoffman Homes I*), *vacated*, 975 F.2d 1554 (7th Cir. 1992), the governing Seventh Circuit case when the parties negotiated the Consent Decree. Under *Hoffman Homes I*, "isolated" wetlands have "no hydrological connection to any body of water * * * no relationship or interdependence with any other body of water * * * are not part of an aquatic ecosystem and do not control floods or pollution in other bodies of water." *Id.* at 1314. *SWANCC*'s definition is far broader. Unlike *Hoffman Homes I*, *SWANCC* does not limit "isolated" waters to areas without any hydrological connection to another body of water. Likewise, whereas *Hoffman Homes I* defines "isolated" waters as those without any relationship or interdependence with another water, "isolated" waters under *SWANCC* include areas that are tenuously but not "significantly" tied to navigable waters.

constitutional authority. See Br. in Opp. 15-16. Neither of these points withstands even superficial scrutiny.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *SWANCC* AND IMPLICATES A RECOGNIZED SPLIT IN THE LOWER COURTS.

The government boldly asserts that the courts of appeals are not "'deeply divided' over the scope of federal regulatory authority under Section 404 of the CWA." Br. in Opp. 14. In fact, this split has been recognized again and again not only by lower courts and legal scholars, see Pet. 14-15, but by the government itself. On January 15, 2003, the Army Corps of Engineers and the Environmental Protection Agency, the very regulators involved in this case, issued an "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States.'" 68 Fed. Reg. 1991 ("Notice"). The Notice expressly recognizes the divide among the courts of appeals over the meaning of *SWANCC*: "While a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and nonnavigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case." *Id.* at 1996. As a result, the Notice recognizes that a number of "uncertainties" exist following *SWANCC* and proposes that field staff seek formal approval from headquarters before asserting jurisdiction over certain isolated waters. *Id.* at 1996, 1997.

The Notice proceeds to discuss the circuit split at length. As to the specific issue of tributaries, for example, it concedes that while a number of courts have held that "*SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters[,] * * * some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and

waters immediately adjacent to navigable waters are involved." 68 Fed. Reg. at 1997 (citing both *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), and the Seventh Circuit's decision in this case as examples of the former and *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 265, 268-271 (5th Cir. 2001), as an example of the latter). This Notice was issued nearly two months before the government filed its brief in this Court—a brief that incredibly tries to disavow the split. The government's position before this Court is at best gross error and at worst disingenuous.

Indeed, the government (Br. in Opp. 14-15) even takes issue with the very divide discussed in the Notice—the split between the Fifth Circuit's decision in *Rice* and the Ninth Circuit's opinion in *Headwaters*. The government argues that these decisions "are not inconsistent with each other, and neither decision in any way conflicts with the Seventh Circuit's ruling in the instant case." Br. in Opp. 15. This remarkable statement not only flies in the face of the government's public Notice, but also is patently untrue. In *Rice*, 250 F.3d at 269, the Fifth Circuit fashioned a bright-line jurisdictional rule: "[u]nder [*SWANCC*], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." By contrast, the Ninth Circuit adopted an "effects test" in *Headwaters*. This standard asks whether the waters in question have a significant connection to, or effect upon, a navigable body of water.

The stark difference between these two interpretations has been the subject of several judicial opinions and scholarly articles.[5] See *FD & P Enterprises* v. *United States Army Corps*

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[5] The government tries to sidestep this issue by briefly recounting the facts of *Rice* and *Headwaters* before its conclusory claim that "[t]he holdings of those decisions are not inconsistent with each other." Br. in Opp. 14-15. This bald statement ignores the well-recognized, irreconcilable difference between the Fifth and Ninth Circuit interpretations of *SWANCC*.

of Eng'rs, 239 F. Supp. 2d 509, 513-515, 516-517 (D.N.J. 2003) (recognizing circuit split, specifically the divide between Fifth and Ninth Circuits, and reading *SWANCC* to require a look at "whether there is a substantial nexus—beyond a mere hydrological connection—between the FD & P Property" and the navigable water at issue); *United States* v. *Lamplight Equestrian Ctr., Inc.*, 2002 WL 360652, at *5 (N.D. Ill. Mar. 8, 2002) (finding that *Rice* and *Headwaters* reached "opposite" conclusions); Lawrence Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision of Solid Waste Agency of Northern Cook County v. Corps*, SG096 ALI-ABA 207, 215 (2002) ("The split in interpretation among the courts wrestling with the *SWANCC* decision was deep and instantaneous"; "the 5th and the 9th [Circuits] split over this issue"); Virginia Albrecht & Stephen Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, SH018 ALI-ABA 249, 285 n.128-131 (2002) (highlighting split between *Rice* and *Headwaters*); see also Pet. 14-15.

It is likewise unquestionable that *Rice* and *Headwaters* are irreconcilable with the Seventh Circuit's finding in this case that the Migratory Bird Rule was the only casualty of *SWANCC*. Under the Seventh Circuit's ruling, *SWANCC* permits federal authorities to regulate isolated waters so long as the Migratory Bird Rule is not the express predicate for federal jurisdiction.[6] Thus, while the Fifth and Ninth Circuits (albeit

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[6] Even the Notice disagrees with the Seventh Circuit's interpretation, reading *SWANCC* to reject more than just the Migratory Bird Rule: "[I]n light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce)." As a result, the Notice requests comments on whether and under what circumstances the factors listed in § 328.3(a)(3)(i)-(iii) or any other factors "provide a basis for

for different reasons) would prohibit federal regulation of petitioners' wetlands—isolated areas with no significant nexus to a navigable water—the Seventh Circuit allows it.

In an apparent effort to distract from this obvious conflict, the government mischaracterizes the Seventh Circuit's decision below:

> The court of appeals did not construe the term "waters of the United States" to encompass isolated wetlands lacking a surface connection to navigable-in-fact waters, and it did not suggest that the federal government could exercise regulatory authority over such wetlands in the face of a timely challenge to the assertion of federal power. Rather, the court simply held that petitioners had identified no relevant change in fact or law since entry of the Consent Decree, and that petitioners were therefore bound by their prior stipulation that the wetlands at issue here are "waters of the United States" within the meaning of the CWA.

Br. in Opp. 14. This reading disregards large sections of the Seventh Circuit's opinion. The court of appeals held—notwithstanding its express assumption "that all waters at issue were nonnavigable, isolated wetlands with no surface connection to the nearest stream or nearest navigable body of water"—that *SWANCC* "does [not] establish that the Government exceeded its authority in entering into the Consent Decree." Pet. App. 10a, 16a. The government ignores this language, which reads *SWANCC* to permit federal regulation of isolated waters with "no surface connection to the nearest stream or nearest navigable body of water."

In fact, the Seventh Circuit expressly rejected petitioners' claim that *SWANCC* "removed from the [Army Corps of

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determining CWA jurisdiction over isolated, intrastate, non-navigable waters." 68 Fed. Reg. at 1994, 1996.

Engineers'] regulatory authority all waters that are not adjacent to bodies of open water"—*i.e.*, waters that are neither navigable themselves nor adjacent to a navigable waterway. Pet. App. 13a. In the Seventh Circuit's view, "the precise holding of *SWANCC* was not so broad"; "in *SWANCC*, the Supreme Court merely held that the definition of 'waters of the United States' under 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, 'exceeds the authority granted to [the Corps] under § 404(a) of the CWA.'" *Ibid.* (quoting *SWANCC*, 531 U.S. at 174).

From the foregoing, it is plain that the Seventh Circuit's ruling is much broader than the government describes. The decision below narrowly interprets *SWANCC* and expressly applies this narrow reading to the instant case, holding that *SWANCC* does not preclude federal regulation of isolated wetlands like petitioners'. This holding is entirely independent of the court's ruling on the application of Rule 60(b)(5) and the attendant question whether there had been a "relevant change in fact or law." See Pet. App. 16a (discussing points separately).

II. THE CONSENT DECREE WAS VOID *AB INITIO* BECAUSE FEDERAL REGULATORS LACK STATUTORY OR CONSTITUTIONAL AUTHORITY OVER PETITIONERS' NON-NAVIGABLE, ISOLATED WETLANDS.

The government fails to address any of the numerous decisions petitioners cite from this Court and other courts for the rule that parties cannot contractually expand the scope of federal authority. See Pet. 20-26. The crux of the government's response on this issue is a single sentence: "Petitioners do not and could not plausibly contend * * * that the federal government lacks authority to negotiate voluntary settlements of CWA enforcement actions." Br. in Opp. 15. This is a red herring. Of course petitioners do not assail the government's right to settle cases. Petitioners challenge its

asserted right to enter into settlements that give federal regulators ongoing authority over wetlands that are beyond the regulators' statutory or constitutional jurisdiction. The government can settle cases, but it cannot use settlements to breach the legal limits on its regulatory power.

A decision the government cites in passing earlier in its brief is thus wholly irrelevant. The government invokes *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), for the unremarkable proposition that a party can be "judicially estopped from asserting a position in a subsequent proceeding contrary to the position it agreed to in a consent decree entered by the court in the same case." Br. in Opp. 12. The position that bound the State of New Hampshire in that case involved the location of its boundary with Maine; the case had nothing to do with federal regulatory authority, let alone the ability to expand this power by contract.

The government also misses the mark with its passing claim that this case is "readily distinguishable from cases in which the invalidity of the relevant government contract is apparent on the face of the agreement." Br. in Opp. 15-16. The government complains that petitioners' theory would force the district court "to conduct a potentially time-consuming inquiry into the physical characteristics of the relevant waters." *Id.* at 16. In fact, decisions cited in the petition struck down contracts because *underlying* facts made them unenforceable. For example, the insurance contract in *Federal Crop Ins. Corp.* v. *Merrill* was not deficient on its face. The Court held that it was void *ab initio* in light of a fact—that most of the insured acres had been reseeded with spring wheat—that was not disclosed in the insurance application. 332 U.S. 380, 382 (1947) ("The formal application itself did not disclose that any part of the insured crop was reseeded"). Likewise, the government agent in *Augusta Aviation, Inc.* v. *United States* acted without authority when it promised veteran education funds in an amount in excess of what the former soldier had earned. 671 F.2d 445, 448-450 (11th Cir. 1982). Once again, an underlying

fact—there the veteran's period of military service—deprived the government agent of contracting authority. Accordingly, the fact that petitioners' claim depends on underlying facts—*i.e.*, the characteristics of the wetlands—is of no moment.

Finally, the government argues as a matter of policy that petitioners' position "would, if accepted, substantially complicate efforts to achieve consensual resolution of federal enforcement actions." Br. in Opp. 16. If the government's point is that petitioners would undermine the permanency of consent decrees, these contracts are already vulnerable to modification under Rule 60(b)(5) when relevant legal or factual changes occur. The well-recognized limits on federal authority on which petitioners rely merely encourage federal regulators to ensure that they have jurisdiction under existing law before executing a contract that gives them ongoing regulatory power. This is hardly an undesirable "complicat[ion]" of the settlement process. It is a rule that discourages agencies from exceeding statutory and constitutional limits on their authority by threatening litigation and coercing a settlement that concedes unlawful agency jurisdiction.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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